authority, it seems hardly possible that the "due process" clause was designed to condemn all *future* restrictions on liberty of contract in the interest of the parties while sanctioning the whole variety of restrictions in the interest of the parties which were then familiar parts of the law.

The law, then, seems everywhere to be that the legislature may, to some extent, at least, restrict liberty to contract in the supposed interest of the persons restrained. Inasmuch as the courts which have opposed such legislation have been far from consistently defining any definite limitation to this branch of the police power, it is hard to see why the legislature's power to protect the citizen against himself is not as broad as its power to shield him from the acts of others.

The best-considered decisions overthrowing legislation as repugnant to the due process clause recognize a police power as broad as this, but hold that the constitution declares a strong public policy in favor of letting every citizen work out his own salvation, and that his power to do so should not be impaired except when necessary to correct an evident existing evil.[18] Such is probably the present state of the law.[19] The result is that the ultimate question for the court is one of fact,[20] which serves perhaps to explain the confusion in the authorities, as well as to excuse the principal case.[21]

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PRICE CUTTING AS A TORT. — The resale price of ordinary articles of commerce cannot be limited at common law by contract or by restrictive covenants running in equity.[1] Articles manufactured by secret processes, as well as copyrighted and patented articles, have been held subject to the same rule.[2] A recent case raises the question whether the producer or his agent, although unable to fix the resale price, is wholly remediless when he is injured by resale price cutting. A department store owner, for the purpose of injuring a selling agent in his business, advertised a well-known make of sewing machines at half price. The court held him liable at the suit of the selling agent on the ground of a malicious injury to the plaintiff's business, under the guise of competition.[3] *Boggs* v. *Duncan-Schell Furniture Co.*, 143 N. W. 482 (Ia.).

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[18] Opinion of the Justices, 208 Mass. 619; Lochner *v.* New York, *supra*; Matter of Jacobs, 98 N. Y. 98. See note 4, *supra*.

[19] Substantially the same conclusion has been deduced from at least two exhaustive reviews of the federal cases: SWAYZE, CONSTRUCTION OF THE FOURTEENTH AMENDMENT, 26 HARV. L. REV. 1, 40; COLLINS, THE FOURTEENTH AMENDMENT, 109.

[20] The expediency of leaving this question of fact to some other tribunal is discussed by Mr. John G. Palfrey in 26 HARV. L. REV. 507.

[21] Whether this will continue to be the rule, and what there is in the phrase "due process of law" to make the validity of an impartial statute, duly passed, turn simply on the court's ability to perceive in it some clearly beneficent purpose, are questions to be pondered. See Central Lumber Co. *v.* Dakota, 226 U. S. 157, 33 Sup. Ct. 66; COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., p. 500.

[1] BENJAMIN, SALES, 6 ed., 746; Garst *v.* Hall & Lyon Co., 179 Mass. 588, 61 N. E. 219. But see 17 HARV. L. REV. 415. For limited restrictions allowed at common law, see 25 HARV. L. REV. 59, 61.

[2] See SHRODER, PRICE RESTRICTION ON THE RE-SALE OF CHATTELS, 25 HARV. L. REV. 59; 27 HARV. L. REV. 73. But see 26 HARV. L. REV. 640.

[3] The further fact that the advertisements contained misrepresentations should be noted.

For a seller to use trade names so as to pass off his goods as those of another is actionable. From these cases it has been ably argued that for a retailer, solely for purposes of self-advertising, to damage a manufacturer's good will by cutting the price of a well-known article is tortious, as involving an unwarranted use of the reputation which the producer's labor has earned for the goods.[4] Other retailers, as authorized selling agents, could maintain actions on the same ground. The result reached in the principal case would follow from this reasoning since the defendant is making just such an unwarranted use of the reputation of the particular sewing machines. But the view is unsupported by any body of authority. There is no misrepresentation here and the trade-name cases emphasize that element as essential.[5]

The problem may be treated in a way more consistent with the reasoning employed by the courts in analogous cases, by weighing the defendant's justification against the wrong done the selling agent. For employing another's reputation for one's own benefit in such a way as to interfere with that other's good will would seem at least to require justification.[6] Even where no acquired good will is in question, there is some authority for recognizing to the same extent an individual's right to the normal flow of the market.[7]

Two grounds of justification in the principal case may be urged. The law recognizes a competitor's right to promote his own business interests.[8] The benefit to the business must actually exist. Thus a banker was not allowed to justify the temporary opening of barber shops to drive the plaintiff out of business.[9] In the absence of other evidence, bad motive may be ground for inferring that no competitive interest was actually served.[10] Where the benefit in fact exists, and where the defendant acts from mixed motives of self-interest and of malice, the mere presence of the bad motive should not vitiate the justification. Since the party is exercising the right for the very purpose for which it is protected, the law need not concern itself with analyzing his state of mind. A second justification appears in the exercise of the *jus disponendi*.[11] The right to dispose necessarily implies the right to fix the price of transfer. The importance of this right is increased by the strong policy of the law against permitting any clogs on the transferability of chattels.[12] This justification only differs from that of competition in that no element of self-interest is required, since the *jus disponendi* includes the right to make a gift. In balancing the justification against the wrong, public policy must determine which deserves the greater protection.[13]

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[4] See ROGERS, PREDATORY PRICE CUTTING AS UNFAIR TRADE, 27 HARV. L. REV. 139.

[5] See PAUL, TRADE-MARKS, § 8; BROWNE, TRADE-MARKS, 2 ed., § 36.

[6] See 16 HARV. L. REV. 135.

[7] See SMITH, CRUCIAL ISSUES IN LABOR LITIGATION, 20 HARV. L. REV. 253, 260; Allen *v.* Flood, [1898] A. C. 1, 29, 34, 36; Jersey City Printing Co. *v.* Cassidy, 63 N. J. Eq. 759, 53 Atl. 230; Atkins *v.* Fletcher Co., 65 N. J. Eq. 658, 664, 55 Atl. 1074, 1076.

[8] See SMITH, CRUCIAL ISSUES IN LABOR LITIGATION, 20 HARV. L. REV. 344, 361.

[9] Tuttle *v.* Buck, 107 Minn. 145, 119 N. W. 946. See 22 HARV. L. REV. 616.

[10] See 26 HARV. L. REV. 740.

[11] See 26 HARV. L. REV. 740.

[12] See Dr. Miles Medical Co. *v.* Park, 220 U. S. 373, 404 ff., 31 Sup. Ct. 376, 383 ff.

[13] See SMITH, CRUCIAL ISSUES IN LABOR LITIGATION, 20 HARV. L. REV. 345.

Where, as in the principal case, two rights are being exercised which it is the policy of the law to protect, the justification would seem sufficient.

Although the competitor's self-interest is in fact advanced and there is an exercise of the *jus disponendi*, a further question is raised where the defendant acts solely from malicious motives.[14] Here again the question is one of policy, whether an entire protection of these interests is so essential to the public as to make considerations of motive relatively unimportant. Privileged communications in court and the right to collect a debt are of this class.[15] On the other hand some recent cases make actionable the use of property for such purposes as spite fences or maliciously draining a neighbor's spring.[16] The policy of such a limitation on the anti-social exercise of property rights would seem to apply with greater force to competition and price cutting from bad motive only, since the complex interdependence of modern business relations causes individual acts to have far-reaching effects. If these cases may fairly be regarded as characteristic of a tendency in the common law, an extension of the same reasoning to price cutting actuated only by bad motive may be suggested as a possible development consistent with public policy.[17]

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RIGHTS OF PASSENGER ASSISTING IN RESTRAINT OF DISORDERLY FELLOW-PASSENGER. — It is clearly established that a carrier is held to the utmost care consistent with efficient service to protect a passenger from assaults by other passengers.[1] So great is this duty that if the conductor unaided is unable to control the situation, he must call in the rest of the crew and at least such passengers as are willing to help quell the disturbance.[2] While this can scarcely be said to be using utmost care to the well-disposed passenger summoned, the courts in the past seem never to have been called upon to determine his rights if assaulted by the disorderly fellow-passenger. However, the Supreme Court of Mississippi recently had this question squarely presented. *Spinks* v. *New Orleans, M. & C. R. Co.*, 63 So. 190. In this case the plaintiff, a passenger, was requested by the conductor to help restrain an intoxicated passenger who had been wandering through the coaches and resisting efforts to keep him from jumping from the train. The court, in holding that the railroad was not liable for an assault committed by the unruly passenger, went on the short ground that the conductor had not failed in his duty of care. This seems unjustifiable. The evidence taken most favorably for the plaintiff, since a directed verdict for the defendant was affirmed, showed that the conductor, knowing of the irresponsible condition of the

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[14] For discussion of motive in the law of torts, see 8 HARV. L. REV. 1; 18 HARV. L. REV. 411; 22 HARV. L. REV. 501; 26 HARV. L. REV. 740.

[15] Morris *v.* Tuthill, 72 N. Y. 575; South Royalton Bank *v.* Suffolk Bank, 27 Vt. 505; Scott *v.* Stansfield, L. R. 3 Ex. 220. See also Friel *v.* Plumer, 69 N. H. 498, 43 Atl. 618.

[16] For collection of authorities see 18 HARV. L. REV. 415, footnotes; 8 MICH. L. REV. 472, footnotes; 62 L. R. A. 673, note.

[17] See discussion in POUND, THE END OF LAW, 27 HARV. L. REV. 195, 226 ff.

[1] Pittsburg & C. R. Co. *v.* Pillow, 76 Pa. St. 510; New Orleans, St. L. & C. R. Co. *v.* Burke, 53 Miss. 200.

[2] See Pittsburg, F. W. & C. Ry. Co. *v.* Hinds, 53 Pa. St. 512, 517.